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No. 95-608

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

IN RE HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, AND CHOPIN ASSOCIATES,

Petitioners,

vs.

FRED STANTON SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, THE BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI, AS TRUSTEE UNDER LAND TRUST # 5008793, MC HOLDINGS PARTNERS, A NEW YORK GENERAL PARTNERSHIP, AND ITS PARTNERS, ROBANK CORPORATION, H.D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., AND M. CENTER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT SMITH'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether certiorari should be granted to review the court of appeals' *per curiam* affirmance of the district court's affirmance of a bankruptcy court order which denied a motion made by Petitioners under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a 1988 dismissal of a complaint where (a) the Court's decision on which the motion was predicated is unrelated to the final judgment sought to be vacated, (b) the motion was untimely filed?

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[1] Local Rule 10 has been eliminated by the Local Rules of the United States Bankruptcy Court for the Southern District of Florida, effective on April 1, 1994.

OPINIONS OF THE LOWER COURTS

The *per curiam* opinion of the court of appeals and the district court's affirmance of the bankruptcy court's ruling are printed at App. 1a and 3a.[2] The bankruptcy court's denial of Petitioners' motion to vacate the 1988 order of dismissal appears at App. 9a.

The final judgment dismissing Petitioners' complaint, docketed in bankruptcy court adversary proceeding no. 87-0546 on May 12, 1988, was unreported. On October 31, 1988, the district court affirmed. *See In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988). The court of appeals also affirmed and this Court denied further review. *See Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989), *cert. denied*, 493 U.S. 1057, 110 S.Ct. 867, 107 L.Ed.2d 951 (1990).

The decision on which Petitioners rely to vacate the order of dismissal is reported at *Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992) (hereafter "tax decision").

The dismissal of Petitioners' appeal of the plan of reorganization, which they assert should no longer be enforced, appears at *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

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[2] The symbol "App. ___" refers to Petitioners' appendix.

BASIS FOR JURISDICTION

Petitioners assert jurisdiction under 28 U.S.C. § 1254(1). There is, however, no legitimate basis for asserting jurisdiction in this case. Petitioners point to no decision of another court of appeals or of this Court which conflicts with the court of appeals' July 19, 1995 decision in this case. Nor do Petitioners demonstrate that the court of appeals' decision has so far departed from the accepted and usual course of judicial proceedings such that this Court's supervisory powers need be invoked. Moreover, Petitioners raise no important federal question that has not been, but should be, settled by the Court. *See* S.Ct.R. 10.1(a) and (c). For these reasons, as demonstrated in more detail hereafter, there is no jurisdictional basis for the Court to grant certiorari.

STATEMENT OF THE CASE

Course of Proceedings

On April 2, 1993, Petitioners filed a "Rule 60(b) Motion for Relief" in the United States Bankruptcy Court for the Southern District of Florida seeking to vacate a May 13, 1988 order dismissing their complaint against Respondents. Petitioners relied on this Court's tax decision, which reversed three lower court rulings and held Respondent Smith, as Trustee of the Miami Center Liquidating Trust, was required to file certain income tax returns and pay those taxes. The bankruptcy court denied the motion, and both the district court and the court of appeals affirmed. This Petition followed.

History of the proceedings

Petitioners were the developers of the Miami Center, a hotel, office building, shopping arcade and parking garage in Miami, Florida. Respondent The Bank of New York ("Bank") was the construction lender. Petitioners are Theodore B. Gould and four companies that he "owned, controlled and dominated."[3]

Following Petitioners' default on the loans, the Bank initiated foreclosure proceedings. Petitioners thereupon filed simultaneous voluntary petitions under Chapter 11 of the United States Bankruptcy Code in August, 1984, in the United States Bankruptcy Court for the Southern District of Florida. The cases were consolidated for administrative purposes upon Petitioners' request.[4]

Petitioners and the Bank filed competing plans of reorganization. Each provided for the sale of the Miami Center. The creditors voted "overwhelmingly" for the Bank's plan, the primary features of which were:

* the creation of the Miami Center Liquidating Trust ("Trust"), consisting of the Debtors' combined assets as defined by Bankruptcy Code § 541(a), 11 U.S.C. § 541(a);

* the appointment of a trustee to administer the Trust;[5]

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[3] *See Miami Center*, 838 F.2d at 1548-49.

[4] *Id.*

[5] Respondent Smith, a stranger to Petitioners' bankruptcy proceedings, was appointed shortly after confirmation of the plan.

* the sale of the Miami Center to the Bank for the M.A.I. appraisal price of $255.6 million;

* payment of Petitioners' creditors from the consolidated assets of the Trust.

See Miami Center, 838 F.2d at 1548-9.

The bankruptcy court confirmed the Bank's plan on August 8, 1985. *In re Holywell Corp.*, 54 B.R. 41, 43 (Bankr. S.D. Fla. 1985). Contrary to the position taken in the Petition at 2, confirmation of the plan was upheld on appeal. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).[6]

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[6] Petitioners disingenuously assert that the court of appeals' dismissal of their appeal of the plan of reorganization, reported at *Miami Center*, 838 F.2d 1547 (11th Cir. 1988), conflicts with an "opinion on the merits of the same court of appeals, concluding that the bankruptcy court lacked authority to confirm the Bank's amended plan, since it did not satisfy the requirements of 11 U.S.C. § 1129, reported at 913 F.2d 873 (11th Cir. 1990) . . . " Petition at 2. A plain reading of the two opinions reveals Petitioners' effort to mislead. In the latter case, one of Petitioners' creditors separately appealed the confirmation order on the ground that the plan treatment of its claim was improper. Respondent Bank posted a bond to protect that creditor so the plan could be implemented during that appeal. The court of appeals ultimately reversed the plan treatment of that particular claim. *See Olympia & York Fla. Equity Corp. v. Bank of New York*, No. 85-3230 slip op. (S.D. Fla. March 24, 1987), *aff'd*, 913 F.2d 873 (11th Cir. 1990). Petitioners have been sanctioned in the bankruptcy court for repeatedly arguing that the court of appeals' decision reported at 913 F.2d 873 in any way reversed its earlier decision, reported at 838 F.2d 1547.

In 1987, Petitioners sued Respondent Smith, individually and as Trustee of the Miami Center Liquidating Trust, and Respondent Bank in state court alleging that Smith was negligent (count I), that he breached common law fiduciary duties owed to Petitioners (count II), and that Smith should be discharged (count III). Essentially, the complaint alleged that Smith was liable to Petitioners in damages for having:

a. paid the Bank post-petition interest on its secured claim, even though the plan required it;

b. failed to resolve post-closing adjustments to the purchase price of the Miami Center more favorably, even though Respondent Smith obtained court approval of the adjustments;

c. failed to establish a reserve for the payment of the tax consequences of the plan, even though the plan did not provide for the taxes;[7]

d. failed to establish a reserve to repay alleged inter-debtor superpriority loans, even though the plan did not provide for repayment and each of the debtors' claims was subordinated;

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[7] Petitioners have since tried again to obtain Smith's dismissal as Trustee for his actions with respect to the taxes, bankruptcy court paper no. 2331, and to have the district court rule on their motion by requesting withdrawal of the order of reference. After the district court refused to do so, *see In re Holywell Corp.*, No. 92-1266 slip op. (S.D. Fla. August 6, 1992) (Order Denying Motion for Withdrawal of Reference), Petitioners abandoned their effort to remove Smith.

e. failed to sue the Bank under Internal Revenue Code § 3505, 26 U.S.C. § 3035, to recover pre-confirmation employee payroll tax obligations of the debtors, even though the statute did not permit it;

f. consented to the establishment of an escrow for real estate taxes on the Miami Center, even though the amount of the taxes due was in dispute; and

g. failed to pay the proofs of claims filed by Petitioners' affiliates, even though the claims were subordinated by the plan.

The case was removed to the bankruptcy court over Petitioners' objection and was subsequently dismissed. The district court affirmed, holding, *inter alia*, that "where the allegations contained in the Complaint involve duties required under the Plan, those duties control and the Trustee is relieved of personal liability for any conflicting duties under common law." *Holywell*, 93 B.R. at 783.

The district court found that the standard of care established by the confirmed plan – gross negligence, willful default or misconduct – was not alleged in the complaint. *Id.* The court found that each of the alleged breaches of duty had already been adjudicated or were then in litigation, and held that the doctrines of *res judicata* and collateral estoppel barred Petitioners' claims. *Id.* The court addressed each "duty" alleged to have been

breached, which is repeated here, *see Holywell*, 93 B.R. at 783-84:[8]

Post-Petition Interest. The confirmed plan provided for the bank to receive post-petition interest on its claim. Also, in a 1987 adversary proceeding, the bankruptcy court held that the Bank was entitled to a credit at the closing on the sale of the Miami Center for post-petition interest on its claim under the terms of the plan because the Bank was not "undersecured." The district court declared the question of whether the Bank was undersecured, and thus not entitled to post-petition interest to be moot on the ground that the plan provided for payment of such interest and the plan was no longer subject to challenge. The court of appeals affirmed.

Superpriority Loans. The "superpriority" loans were inter-debtor loans and loans made by a wholly-owned subsidiary of the debtors. The issue of the lenders' entitlement to repayment was litigated and Respondent Smith prevailed. The courts reasoned that because the plan substantively consolidated the debtors' assets and liabilities into the Miami Center Liquidating Trust, Respondent Smith would only have had to repay the Trust and not the discharged debtors, as Petitioners argued. In other words, the Trust both owned and owed the obligation to itself. Further, in yet another of Petitioners' challenges on this issue, the district court held and the court of appeals affirmed that Petitioners were equitably estopped from claiming any right to repayment.

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[8] In the interest of brevity, Respondent Smith refers the Court to *Holywell*, 93 B.R. 783-84 for the relevant citations to each of the cases litigated by Petitioners.

Ad Valorem Tax Escrow. As the amount of local property taxes was in dispute when the sale of the Miami Center closed, Respondent Smith and the Bank escrowed the funds necessary to pay the taxes. Petitioners unsuccessfully appealed both the establishment of the escrow account and the subsequent settlement with Dade County, Florida, of the amount of the taxes.

Employer-In-Fact Tax Obligations. Petitioners' contention that Smith was required to sue the Bank pursuant to Internal Revenue Code § 3505 for employer-in-fact tax liability was separately litigated and rejected. The lower courts ruled that under the statute, *only* the IRS had standing to bring such an action.

Reserve For Income Taxes. Until mid-1987, Petitioners and their accountant, Touche, Ross & Co., maintained that Petitioners were responsible for filing tax returns and paying the income tax consequences of the plan of reorganization. When Petitioners changed their position, Smith filed an action for declaratory relief to determine his obligations because the plan failed to disclose or provide for those taxes. Petitioners did not file any counterclaim against Smith in that proceeding. The bankruptcy court, the district court and the court of appeals all ruled that the Miami Center Liquidating Trust was not responsible for the tax consequences of the plan. This Court reversed, holding that Smith, as Trustee, was required to file tax returns and pay any taxes owed, pursuant to Internal Revenue Code § 6012(b)(3,4), 26 U.S.C. § 6012(b)(3,4). The Court did not address the issue of Smith's personal liability for the taxes, as it was not

before the Court.[9] This Court also did not directly or indirectly address any of the other subjects raised in Petitioners' 1987 complaint.

Petitioners filed their Rule 60(b) motion, the denial of which is the subject of this Petition, *over a year* after this Court's tax decision, claiming that the tax decision constituted a reversal of the prior dismissal of the 1987 complaint. One month later, Petitioners filed a counterclaim against Smith, individually and as Trustee, in the remand proceedings from the tax decision.[10] In that counterclaim, Petitioners sought damages for Smith's alleged breach of fiduciary duty, gross negligence and conspiracy with respect to the tax issues and the payment to the Bank of post-petition interest – two of the same issues Petitioners seek to resurrect from the 1987 complaint.

Smith settled all of the outstanding tax claims with the tax authorities over Petitioners' objections, and successfully defended against the counterclaims. The bankruptcy court entered judgment in Smith's favor and the district court affirmed.[11]

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[9] Indeed, Smith was not a party to that proceeding in his individual capacity, and the government never pursued any claim against him personally.

[10] Smith filed an amended complaint in the remand proceedings from the tax decision against the federal government and the Bank seeking a determination of the amount and priority of the tax obligations and the Bank's liability therefor. Petitioners were named as interested parties.

[11] *See Holywell v. Smith*, No. 87-0627 slip op. (Bankr. S.D. Fla. October 30, 1993), *aff'd*, No. 94-0111 (S.D. Fla. June 16, 1994).

True to prior conduct Petitioners have pursued relief in this Court.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI IS NOT WARRANTED WHERE THERE IS NO FACTUAL OR LEGAL BASIS FOR THE RELIEF SOUGHT

A. The Tax Decision Is Unrelated.

Petitioners' claim that the tax decision constitutes a reversal of the rulings on which the dismissal of the 1987 complaint was based. That conclusion is wrong. As the district court succinctly held,

> The Supreme Court decision was limited to the issue of the Trustee's responsibility to file tax returns and pay federal taxes. The Court held that the failure of a plan of reorganization to provide for the taxes did not bind federal tax authorities. This decision does not effect the issues raised in the Complaint.

Petitioners' App. 5a.

In fact, in the remand proceeding from the tax decision the bankruptcy court held, and the district court affirmed, that "[t]he Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee." *Id.* at 6a.

The issue before this Court in the tax decision and the only issue ruled upon was Respondent Smith's tax filing and payment responsibilities as Trustee under the

Internal Revenue Code. The Court ruled that Respondent had statutory tax obligations. It did not hold the Trustee personally liable to Petitioners nor did it rule he owes the Petitioners any duties outside the scope of the confirmed plan. Clearly, the tax decision has no bearing on the non-tax issues raised in the 1987 complaint.

Petitioners further contend that the tax decision renders it "inequitable" to further recognize the binding effect of the court of appeals' ruling in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), which dismissed the debtors' appeal of the order confirming the plan of reorganization. A plain reading of the tax decision, not to mention the result of the proceedings on remand therefrom,[12] demonstrates the frivolousness of the argument.

Rule 60(b) relief is an extraordinary remedy, granted only upon a showing of exceptional circumstances. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054 (11th Cir. 1986). The decision of whether to grant such a motion is left to the sound discretion of the trial court. *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990). Petitioners have failed to demonstrate that the lower courts abused their discretion, hence the writ should be denied.

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[12] Referring to the settlement in full with the tax authorities, the judgment obtained by Respondent Smith against the Bank, and the judgment in favor of Smith on Petitioners' claims regarding his handling of the tax issues.

B. The Motion Was Untimely Filed

The lower courts found that Petitioners' motion for relief under Rule 60(b) was untimely filed. App. 7a. Certiorari is not ordinarily available to review evidence or to discuss specific factual determinations, as the Court customarily does not review the sufficiency of the evidence. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 113 S.Ct. 2578, 2591, 125 L.Ed.2d 168 (1993); *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 208 (1939); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Rule 60(b), made applicable to bankruptcy proceedings by Bankr. R. 9024, 11 U.S.C. § 9024, requires such motions to be filed "within a reasonable time." This Court's tax decision was entered on February 25, 1992, but Petitioners did not file their motion until April 2, 1993. Local Bankruptcy Rule 10 of the Southern District of Florida, in effect at the time Petitioners filed their motion, provided that "[w]henever a party is authorized by statute or rule to file a motion, application or other pleading in connection with a bankruptcy case or proceeding and no time is specified for the pleading to be filed, *it shall be filed within ten days after the event that precipitated the pleading.*" Petitioners waited over a year after the "precipitating event," and offered no credible explanation for the delay. For these reasons, the lower courts found that the motion was untimely. App. 7a.

Petitioners point to no extraordinary evidence that would warrant the Court's review of the lower court's conclusion.

CONCLUSION

For all of the foregoing reasons, the writ should be denied.

Respectfully submitted,

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